STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 14, 2005
v	No. 253440 Muskegon Circuit Court
BOB DAVID BAILEY, Defendant-Appellant.	LC No. 02-047931-FH

Before: Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and resisting or obstructing a police officer, MCL 750.479. He was sentenced as a fourth habitual offender, MCL 769.12, to enhanced, concurrent terms of seventy-six months to twenty years in prison for the possession with intent to deliver conviction, and eighteen months to fifteen years in prison for the conviction of resisting or obstructing a police officer. Defendant appeals as of right, and we affirm.

I

Defendant first contends that the circuit court should have granted his motion to suppress a bag containing crack cocaine, which the police obtained from his person, and his subsequent statement to the police, because the police did not have a warrant and lacked probable cause to detain and arrest him. In addressing a defendant's challenge to a trial court's suppression ruling, we review for clear error the court's findings of fact. *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001). Clear error exists if some evidence supports the trial court's finding, but a review of the entire record leaves this Court with the definite and firm conviction that the trial court made a mistake. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003). We review de novo legal questions, including whether the relevant facts support a finding of probable cause to warrant a valid constitutional search or seizure, and whether to apply the exclusionary rule. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005); *Walsh v Taylor*, 263 Mich App 618, 628; 689 NW2d 506 (2004).

The United States and Michigan constitutions protect individuals against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11.[1] A search conducted without a warrant generally qualifies as unreasonable unless both probable cause and circumstances establishing an exception to the warrant requirement exist. *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000). "(I)n light of the exigency arising out of the mobility of the vehicle, law enforcement officers may search an automobile on the basis of probable cause without the issuance of a search warrant." *People v Garvin*, 235 Mich App 90, 101; 597 NW2d 194 (1999) (quotation omitted). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v MacLeod*, 254 Mich App 222, 228; 656 NW2d 844 (2002), quoting *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

A

Only two police officers involved in the ultimate arrest of defendant testified at the hearing regarding his motion to suppress. Muskegon Heights Police Officers John Waldo and Rory Rought testified that around 3:00 p.m. on September 11, 2002, in response to an anonymous tip concerning illegal drug use, they drove separate vehicles to the vicinity of 2800 Fifth Street, an area known as the scene of many drug-related crimes. From the tinted front window of a funeral home, Rought directed his attention across the street to a group of four African-American males that included defendant; Waldo stationed himself somewhere out of sight, from where he would "be able to respond in a quick manner if needed."

Rought observed the men in the group talking and drinking alcohol, until defendant began walking away from the group toward a white female. According to Rought, "[t]hey exchanged something," and defendant "turned around and handed money to another black male. They all got into a car and took off." Rought requested over a radio that Waldo pull over the car, a white Chevrolet Monte Carlo SS, and informed Waldo that the man involved in the transaction had gotten into the car's backseat.

Waldo testified, "When I saw the vehicle I recognized the driver as Derk Stimich," whom Waldo previously had arrested for "numerous driving-on-suspended-license violations." Stimich "was not wearing a seatbelt," and as of "a few days prior to that, . . . [Stimich] . . . still . . . had pending suspend[ed] driving charges." Waldo pulled over the Monte Carlo, advised Stimich that "the reason I stopped him originally was because he didn't have his seatbelt on," had Stimich "step out of the vehicle," and arrested him for driving with a suspended license.

While Waldo arrested and handcuffed Stimich, he kept his attention focused on the two passengers of the Monte Carlo, including defendant, who sat in the back seat. Waldo noticed an open beer bottle near the front seat passenger. Waldo recalled that he "kept watching

[1] "Generally, evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings." *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000).

[defendant] squirming around and fidgeting. I couldn't see his hands in plain view at all times, which for officer's safety was making me nervous." Defendant ignored Waldo's repeated requests that he sit still and leave his hands in view, and "kept reaching down toward[] his right side," to an area that Waldo could not see clearly from his position outside the car. Waldo primarily feared that defendant had a weapon, "but due to the nature of the complaint [he] felt that [defendant] may be carrying narcotics as well."

Because Waldo intended to pat down defendant out of concern for his safety, he removed defendant from the Monte Carlo, walked him to the rear of the car, and instructed him to "put his hands on the trunk." Defendant continued behaving nervously and "[f]idgeting around," and hesitated to comply with Waldo's direction to place his hands on the car. Waldo "attempted to handcuff [defendant] for officer safety before" patting defendant down because "[h]e just seemed like possibly he may be getting ready to run, to fight."

When Waldo placed a handcuff on one of defendant's arms, defendant moved his right hand toward the right front pocket of his jeans. As defendant reached, Waldo grabbed his right hand and felt a lump inside defendant's pocket, which Waldo "immediately believed . . . was narcotics." According to Waldo, defendant "continued to resist and . . . managed to start pulling . . . out with his fingertips. . . . a cellophane bag." Defendant eventually freed the bag from his pocket and dropped it onto the ground near Waldo, who secured it. As defendant continued to struggle, Rought and another officer helped replace his hands on the trunk, and Waldo successfully handcuffed him. The bag appeared to contain rocks of crack cocaine.

B

The suppression hearing testimony amply establishes that Waldo had probable cause to pull over the Monte Carlo without a warrant pursuant to the automobile exception. Given that Waldo recognized Stimich, the driver, from previous suspended license arrests, believed that Stimich's license remained suspended as of September 11, 2002, and saw Stimich driving without wearing his seatbelt, a reasonably cautious man viewing the circumstances could believe that Stimich was committing two traffic offenses, specifically violations of MCL 257.710e and MCL 257.904. *MacLeod*, *supra* at 228.

Defendant maintains that Waldo lacked probable cause to pull over the Monte Carlo because he stopped the car on the basis of Rought's instruction to do so, and the vague information Waldo received from Rought regarding a transaction involving defendant did not constitute probable cause for stopping the car. Defendant theorizes that Waldo used the alleged traffic violations by Stimich as a pretext for stopping the car as an excuse to detain and search defendant. But a traffic violation stop and arrest does not become "invalid by the fact that it was 'a mere pretext for a narcotics search'" because a police officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v United States*, 517 US 806, 812-813; 116 S Ct 1769; 135 L Ed 2d 89 (1996); see also *People v Kazmierczak*, 461 Mich 411, 420 n 8; 605 NW2d 667 (2000) (observing that in light of *Whren*, the involved traffic stop was valid because the officer observed a traffic violation); *People v Davis*, 250 Mich App 357, 362-363; 649 NW2d 94 (2002) (holding that where the facts established probable cause for an officer to pull over the defendant's car on the basis of observed traffic violations, the stop was constitutionally valid, and the defendant's motion to suppress cocaine the officer subsequently

found in searching the car was properly denied, irrespective of the defendant's claim that the reasons given by the officer were a pretext for the stop).

C

The suppression hearing testimony also substantiates that after Waldo stopped the Monte Carlo, he properly detained defendant pursuant to the "stop-and-frisk exception to the warrant requirement." *People v Wallin*, 172 Mich App 748, 750; 432 NW2d 427 (1988). "On the basis of a reasonable suspicion of possible criminal activity and reasonable fear for his own or others' safety, a police officer may pat down an individual for the limited purpose of discovering weapons." *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993). The testimony by Waldo and Rought establishes that the traffic stop occurred in an area known for frequent drug-related crimes, Rought communicated to Waldo his belief that defendant had engaged in a transaction, Stimich committed two traffic violations while proceeding away from the scene of the hand to hand transaction, defendant acted in a nervous and fidgety manner throughout the traffic stop, and defendant repeatedly moved his hands out of Waldo's view despite Waldo's requests to leave his hands in view. We conclude that "a reasonably prudent person in the particular circumstances would be warranted in the belief that his safety or the safety of others was in danger." *Id.*[2] Furthermore, Waldo's decision to handcuff defendant during the patdown was a reasonable intrusion given defendant's repeated furtive movements in the face of Waldo's instructions to keep his hands in view. *Wallin*, *supra*.

Because the police had probable cause to stop the Monte Carlo and a reasonable suspicion to pat down defendant, we conclude that the circuit court properly denied defendant's motion to suppress the crack cocaine seized from defendant and his statement to the police after his arrest.

II

Defendant next argues that the circuit court improperly admitted drug profile testimony as substantive evidence that he possessed crack with the intent to deliver it. Defendant failed to preserve this issue for appellate review because, although he objected at trial to the qualifications of the prosecution's expert, Officer Steve Waltz, he did not thereafter challenge the substance of any drug profile testimony by Waltz.[3] *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992) (explaining that an objection raised on one ground does not preserve an appellate attack based on a different ground). We review unpreserved issues only to determine whether a plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Even if plain error exists, we will reverse only if the error resulted in the

[2] In *Muro*, this Court upheld the validity of a police officer's stop and frisk of a passenger in a traffic-stopped vehicle under the circumstances that the vehicle's two occupants exhibited nervous gestures and suspicious movements, the driver's license was suspended, and an outstanding warrant existed for the driver's arrest. *Id*. at 746-748.

[3] On appeal, defendant does not challenge Waltz' qualifications to testify as a drug profile expert.

conviction of an actually innocent defendant, or the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Id*. at 763, 774.

"[D]rug profile evidence is not admissible as substantive evidence of guilt." *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). A qualified expert may, however, properly testify with respect to drug profile characteristics in a manner that "give[s] the trier of fact a better understanding of the evidence or assist[s] in determining a fact in issue." *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999). "[C]ourts must take into consideration the particular circumstances of a case and enable profile testimony that aids the jury in intelligently understanding the evidentiary backdrop of the case, and the modus operandi of drug dealers, but stop short of enabling profile testimony that purports to comment directly or substantively on a defendant's guilt." *Id*. at 56.

Murray presents four factors that help distinguish "between the appropriate and inappropriate use of drug profile evidence." *Murray*, *supra* at 56-58. Here, the prosecutor initially enunciated a proper purpose for admitting Waltz' expert drug profile testimony, specifically to assist the jury in understanding the general nature of "crack cocaine use, possession, sale and manufacture here in Muskegon County." *Id*. at 56, 59. But the prosecutor subsequently blurred the distinction between Waltz' profile testimony and the substantive evidence at trial by repeatedly expressing during his closing and rebuttal arguments that defendant's actions, when considered in light of Waltz' testimony, showed his guilt of possession with intent to deliver crack. *Id*. at 57, 59-60.

With respect to the second factor discussed in *Murray*, evidence other than the profile testimony, including the crack obtained from defendant's pocket and defendant's admission of his intent to sell the crack, supported defendant's possession with intent to deliver conviction. *Murray*, *supra* at 57. Third, the circuit court at no time instructed the jury with respect to "the proper and limited use of profile testimony." *Id*. at 57, 60-61. Regarding the fourth factor, Waltz did not opine on the basis of the profile that defendant was guilty in this case, and for the most part testified in general terms that did not "expressly compare . . . defendant's characteristics to the profile in such a way that guilt is necessarily implied,"[4] *Id*. at 57-58, 61-63; the prosecutor, however, repeatedly urged the jury to apply the drug profile to defendant in determining his guilt.

Assuming, arguendo, that at least some of the evidence was improperly admitted or used, we conclude that any error did not affect defendant's substantial rights. Other evidence showed that defendant possessed crack with the intent to deliver it. Waldo recounted at trial that during the traffic stop of the white Monte Carlo, defendant sat in the back seat "obviously nervous" and "fidgeting." Waldo and Rought described that defendant resisted police efforts to pat him down, and eventually pulled from his right front pocket a plastic bag that contained eighteen rocks of crack cocaine. Rought testified that after defendant's arrest, he advised defendant of his

[4] Waltz only once specifically referred to the facts of the instant case when he testified that the intersection where defendant was observed making a hand to hand transaction had "a lot of drug activity." *Murray*, *supra* at 63.

constitutional rights at the police station, and that defendant expressed his understanding of the rights and agreed to speak with Rought. During the interview, defendant acknowledged having purchased the crack that was recovered from his pocket, and that "he had purchased it because he needed extra money and he was going to sell it." In light of this properly admitted evidence, we cannot conclude that defendant actually was innocent of the possession with intent to deliver charge, or that the drug profile testimony "seriously affected the fairness, integrity, or public reputation of [the] judicial proceedings." *Carines*, *supra* at 774.

III

Defendant further asserts that the prosecutor engaged in prejudicial misconduct when she vouched for the officers' credibility during her closing argument. "[A] prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Our review of the record reflects that on the basis of the police officers' trial testimony, the prosecutor properly characterized their account of defendant's arrest as "convincing, . . . credible and . . . consistent." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Because the prosecutor did not suggest that she had some special knowledge concerning the officers' truthfulness and the circuit court cautioned the jury that the attorneys' arguments did not constitute evidence, we find no error.

IV

Defendant also maintains that the circuit court should have excluded testimony regarding his statement to the police because the police failed to record the statement in audio or video form. Defendant acknowledges that he lodged no objection in the circuit court to the admissibility of his confession on this basis. We decline to address this issue beyond observing that (1) in *People v Fike*, 228 Mich App 178, 186; 577 NW2d 903 (1998), this Court specifically rejected the contention that under the United States and Michigan constitutions, "the failure of the police to electronically record defendant's confession was so 'fundamentally unfair' that the concept of justice was offended," (2) the Michigan Supreme Court denied the application for leave to appeal filed by the defendant in *Fike*, 459 Mich 943 (1999), (3) in *People v Geno*, 261 Mich App 624, 627-628; 683 NW2d 687 (2004), this Court recently revisited the precise question whether the United States or Michigan constitutions require electronic recording of custodial statements, and again rejected the proposition, (4) the Michigan Supreme Court denied leave to appeal in *Geno*, 471 Mich 921 (2004), and (5) in both *Fike*, *supra* at 183-186, and *Geno*, *supra* at 627-628, this Court declined to follow *Stephan v State*, 711 P 2d 1156 (Alas, 1985), the case on which defendant primarily relies.

V

Defendant lastly argues that his trial counsel provided ineffective assistance by failing to secure the presence of Janelle Schonegg, who, according to her affidavit attached to defendant's supplemental brief on appeal, would have testified that (1) she spoke for several minutes with defendant, her close friend, near Broadway on September 11, 2002, (2) they discussed their "plans to talk and meet later that evening," (3) she "was carrying a bottle of niacin vitamins . . . and gave [defendant] four of them," (4) before she and defendant parted ways, "another male

came over and [defendant] handed him a twenty . . . dollar bill, getting fifteen dollars back. . . . [because defendant] had . . . agreed to contribute five . . . dollars to purchase more provisions for a barbeque," and (5) she "did not purchase or receive any drugs whatsoever from [defendant], nor was any money exchanged." Schonegg's testimony would have tended to supply an innocent explanation for Rought's testimony that he observed defendant and a woman speak briefly and engage in "a hand-to-hand transaction," after which defendant "had money in his hand" that he gave to another man. But even assuming that defendant's trial counsel unreasonably failed to call Schonegg as a witness at trial, we cannot conclude that this failure prejudiced defendant with respect to his possession with intent to deliver conviction, in light of the facts that defendant removed a bag containing eighteen rocks of crack from his pocket, and defendant admitted that he intended to sell the crack. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (explaining that for ineffective assistance to exist, the defendant must demonstrate that but for counsel's error, the result of the proceedings would have been different, and that the trial was fundamentally unfair or unreliable).

Affirmed.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Michael J. Talbot